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**Cascades Containerboard Packaging—Niagara, A Division of Cascades Holding US Inc. and International Association of Machinists and Aerospace Workers, District Lodge 65, AFL–CIO.** Cases 03–CA–242367, 03–CA–243854, and 03–CA–248951

February 9, 2021

**DECISION AND ORDER**

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN,  
EMANUEL, AND RING

On March 17, 2020, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,<sup>1</sup> and conclusions, to amend the remedy, and to adopt the recommended Order as modified and set forth in full below.<sup>2</sup>

<sup>1</sup> The Respondent has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, some of the Respondent’s exceptions imply that the judge’s rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge’s decision and the entire record, we are satisfied that the Respondent’s contentions are without merit.

We affirm the judge’s conclusion that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally implementing a 2-week layoff beginning May 20, 2019, on the basis that the Respondent presented the layoff decision to the Union as a fait accompli. In so finding, we rely on the totality of the circumstances, particularly the fact that there were two rounds of layoffs—about 19 employees the first week and 18 the second—and the Respondent proceeded with the second round after having received the Union’s request to bargain. We do not pass on whether the Respondent’s May 14, 2019 notice to the Union—which declared that employees “will be laid off”—would, standing alone, establish that the layoff was a fait accompli. See *Haddon Craftsmen*, 300 NLRB 789, 790 (1990) (“The Board has found that it is not unlawful for an employer to present a proposed change in terms and conditions of employment as a fully developed plan or to use positive language to describe it.”), *rev. denied mem. sub nom. Graphic Communications Workers Local 97B v. NLRB*, 937 F.2d 597 (3d Cir. 1991).

We also affirm the judge’s alternative finding that, even if it did not present the layoff as a fait accompli, the Respondent still violated Sec. 8(a)(5) and (1) by failing to give the Union sufficient notice and

**AMENDED REMEDY**

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing terms and conditions of employment of unit employees, we shall order it to notify and, on request, bargain with the Union before implementing any further changes in wages, hours, or other terms and conditions of employment of unit employees. Having found that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing a 2-week layoff beginning around May 20, 2019, and by unilaterally subcontracting bargaining unit janitorial work beginning around May 2019, we shall order it to restore the status quo ante. Further, having found that the Respondent, in June or July 2019, violated Section 8(a)(5), (3), and, derivatively, (1) by unilaterally and discriminatorily changing how it calculates unit employees’ profit-sharing plan payments or reducing the amount of those payments because employees voted to unionize or otherwise engaged in union activity, we shall also order the Respondent to rescind that unlawful change and restore the status quo ante.

Having found that the Respondent violated Section 8(a)(5) and (1) by failing to provide the Union with requested relevant information, we shall order it to furnish

opportunity to bargain before implementing the layoff. No bright-line rule applies here; the test is whether the notice was sufficient under the circumstances. The Respondent gave the Union 6 days’ notice. Under other circumstances, that might have been sufficient. See, e.g., *Medicenter, Mid-South Hospital*, 221 NLRB 670, 678–680 (1975). Here, however, the Union had only very recently been certified, and its business agent had to determine whether this layoff would continue a past practice of similar layoffs because, if it did, the Respondent would have had no duty to bargain over it. Moreover, the record fails to explain why the layoff had to be implemented so hastily. Although the Union could have responded with greater alacrity, we find that under these circumstances, 6 days’ notice was insufficient. Unlike the judge, however, we do not rely on the Respondent’s purported failure to “provide the specifics of the layoff” in its May 14 notice.

We agree with the judge that the Respondent violated Sec. 8(a)(3) and (1) by reducing employees’ profit-sharing plan payments, but the judge erred in applying *Wright Line* in deciding this allegation. See 251 NLRB 1083 (1980) (subsequent history omitted). *Wright Line* applies where motive is in dispute, and it is not disputed here: direct evidence establishes that the Respondent reduced the payments because of “the union situation,” and the Respondent states no other reason for the reduction. See, e.g., *CGLM, Inc.*, 350 NLRB 974, 974 fn. 2 (2007), *enfd.* 280 Fed.Appx. 366 (5th Cir. 2008).

<sup>2</sup> We shall modify the judge’s recommended Order to conform to the amended remedy and the Board’s standard remedial language, and in accordance with our decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). For the reasons explained herein, we shall require the Respondent to furnish to the Regional Director for Region 3 copies of appropriate W-2 forms. Finally, we shall substitute a new notice to conform to the Order as modified.

to the Union the information it requested on August 16, August 26, and September 3, 2019. Further, having found that the Respondent violated Section 8(a)(3) and (1) by refusing to display and otherwise share with employees monthly profit information for the Niagara Falls, New York facility, we shall order the Respondent to display and share this information in the manner it did prior to the April 2019 representation election.

The Respondent shall make whole its employees for any loss of earnings and other benefits suffered as a result of the unlawful layoffs, unlawful subcontracting, and unlawful changes to its calculation of profit-sharing plan payments. Backpay owed as a result of the layoffs shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate laid-off employees for their reasonable search-for-work and interim employment expenses, if any, regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Backpay owed as a result of other unlawful changes, which did not result in any cessation of employment, shall be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Additionally, we shall order the Respondent to compensate affected unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), and file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each affected employee in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

To better effectuate the Social Security reporting remedy, the General Counsel asks us to order the Respondent to furnish to the Regional Director copies of “appropriate W-2 forms” for affected employees. According to the General Counsel, experience has shown that the Social Security Administration (SSA) will not credit earnings or otherwise process backpay-allocation reports forwarded

by Regional Directors unless the SSA can compare the information in those reports to the corresponding W-2 forms. As the General Counsel states in Memorandum 20-02, the SSA has notified the NLRB that in many situations, backpay awards could not be applied to the appropriate calendar year because the information contained in the backpay-allocation report did not match the W-2 submitted by the employer or because the employer had failed to submit a W-2 for the individual in question. The General Counsel states that as a result, backpay is not being credited to the year in which it would have been earned had no violation been committed, which may cause an affected employee to receive less in Social Security benefits than he or she ought to receive or to fail to meet the requirements to receive benefits altogether. The General Counsel contends that these problems will be rectified if employers are required to submit the appropriate W-2 forms to Regional Directors, who would ensure that backpay-allocation reports and W-2 forms are mutually consistent before submitting them to SSA.

The Board has broad discretionary authority under Section 10(c) to fashion appropriate remedies that will effectuate the purposes of the Act. See, e.g., *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262–263 (1969). Having considered the General Counsel’s proposal, we agree with him that requiring employers subject to a backpay obligation to furnish appropriate W-2 forms will effectuate the purposes of the Act.

The aim of a Board order is “restoration of the situation, as nearly as possible, to that which would have obtained but for” the unfair labor practice or practices. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Absent any unfair labor practice, and assuming no lawful cessation of employment, employees would have received their wages or salaries in the regular course; the employer would have reported those wages in such a way as to enable the SSA to record them as having been paid in the calendar years in which they were earned; and the potential for errors in calculating Social Security benefits would have been minimized. But when an unfair labor practice results in an employee’s wages or salary being unlawfully reduced or eliminated altogether, backpay to remedy that loss is eventually paid in a lump sum, typically in a calendar year other than the year or years in which it would have been earned had no violation been committed. If the lump-sum payment is not properly allocated by the SSA to the year or years in which it would have been earned absent the unfair labor practice, the employee may be disadvantaged in several ways. See *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB at 103–104 & fn. 15 (detailing potential losses in social security benefits resulting from misallocation).

The Board first addressed this problem in *Latino Express, Inc.*, 359 NLRB 518 (2012), but that decision proved to be invalid because at the time it issued, the Board included two persons whose appointments were constitutionally infirm. See *NLRB v. Noel Canning*, 573 U.S. 513 (2014). The Board readopted the *Latino Express* remedies in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB at 101, requiring employers, as relevant here, to submit to the SSA reports that allocated backpay to the appropriate calendar quarters. Subsequently, the Board learned that the SSA would not accept these reports if it received them before it received affected employees' W-2 forms. Since a W-2 form reflecting the amount of a backpay award is typically issued early in the calendar year *after* the year in which the award is paid, this meant that the SSA was rejecting most employer-filed backpay-allocation reports. The Board also learned that the SSA wanted backpay allocated to calendar years rather than quarters. Addressing both of these concerns, the Board began requiring employers to file backpay reports—allocating backpay to the appropriate calendar year or years rather than quarters—with the Regional Director, who assumed the responsibility of transmitting the report to the SSA “at the appropriate time and in the appropriate manner.” *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143, slip op. at 1.

Now, the General Counsel informs us that in many cases, the SSA has been unable to allocate backpay awards to the appropriate calendar year or years because the information contained in the backpay-allocation report does not match the W-2 submitted by the employer or because the employer has failed to submit a W-2 for the individual in question. He proposes that we require employers to submit the appropriate W-2 forms to the Regional Directors, who would ensure that backpay reports and W-2 forms are mutually consistent before submitting them to the SSA. The proposed change is warranted. Despite our best efforts to date, backpay claimants continue to be at risk of receiving less in Social Security benefits than they are entitled to receive, and even of failing to qualify for benefits altogether. By requiring employers to furnish Regional Directors with both backpay-allocation reports and corresponding W-2 forms, we seek to minimize this risk. In short, this remedy will effectuate the purpose of backpay orders, which is to make victims whole for losses suffered as a result of unlawful conduct. *Don Chavas, LLC, d/b/a Tortillas Don Chavas*, 361 NLRB at 102 (citing cases).

<sup>3</sup> The remedy applies only to employers. See *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB at 103 fn. 12.

To illustrate the remedy we adopt today, assume the Respondent satisfies its obligations under the make-whole provisions of the Order

Accordingly, we will include the following remedy in this case and in all pending and future cases that require a respondent employer to make one or more employees whole. In addition to the backpay-allocation report, the respondent must file with the Regional Director a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.<sup>3</sup>

#### ORDER

The National Labor Relations Board orders that the Respondent, Cascades Containerboard Packaging—Niagara, a Division of Cascades Holding US Inc., Niagara Falls, New York, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Coercing employees in the exercise of their rights under the Act by telling them that their profit-sharing plan payments have been reduced or changed because they voted to unionize or otherwise engaged in union activity.

(b) Refusing to display or otherwise share with employees monthly profit information for the Niagara Falls, New York facility because they voted to unionize or otherwise engaged in union activity.

(c) Changing how it calculates unit employees' profit-sharing-plan payments or reducing the amount of those payments because employees voted to unionize or otherwise engaged in union activity.

(d) Unilaterally changing the terms and conditions of employment of unit employees, including by unilaterally laying them off, unilaterally subcontracting unit janitorial work, and unilaterally changing how it calculates unit employees' profit-sharing plan payments or reducing the amount of those payments.

(e) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

##### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make affected unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful 2-week layoffs that began around May 20, 2019, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

during 2021. It must file with the Regional Director for Region 3 a copy of the 2021 W-2 for each individual to whom a lump-sum award was made. Given when the Respondent will generate these W-2s, it will file them with the Region early in 2022.

(b) Make affected unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful subcontracting of bargaining-unit janitorial work, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Make affected unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful changes to their profit-sharing plan calculations and payments, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Compensate affected unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards.

(e) Within 21 days of the date the amount of backpay is fixed either by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown, file with the Regional Director for Region 3 a report allocating the backpay award to the appropriate calendar years for each affected employee.

(f) File with the Regional Director for Region 3 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

(g) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All full-time and regular part-time Production and Maintenance employees employed by Respondent at its facility located at 4001 Packard Road, Niagara Falls, NY 14303, excluding all fire watch employees, office clerical employees, guards, professional employees and supervisors as defined in the Act, and all other employees.

(h) Restore the unit employees' terms and conditions of employment to the status quo before the unlawful unilateral changes were made.

(i) Display and share monthly profit information for the Niagara Falls, New York facility in the manner this information was displayed and shared with unit employees prior to the April 2019 union election.

(j) Furnish to the Union in a timely manner the information requested by the Union on August 16, August 26, and September 3, 2019.

(k) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, Social Security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(l) Post at its Niagara Falls, New York facility copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 26, 2019.

(m) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 9, 2021

Lauren McFerran,

Chairman

Marvin E. Kaplan,

Member

<sup>4</sup> If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting

of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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William J. Emanuel, Member

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John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

### APPENDIX

#### NOTICE TO EMPLOYEES

#### POSTED BY ORDER OF THE

#### NATIONAL LABOR RELATIONS BOARD

#### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coerce you in the exercise of the rights listed above by telling you that your profit-sharing plan payments have been reduced or changed because you voted to unionize or otherwise engaged in union activity.

WE WILL NOT refuse to display or otherwise share with you monthly profit information for the Niagara Falls, New York facility because you voted to unionize or otherwise engaged in union activity.

WE WILL NOT change how we calculate profit-sharing-plan payments or reduce the amount of those payments because you voted to unionize or otherwise engaged in union activity.

WE WILL NOT change your terms and conditions of employment—including by laying you off, subcontracting unit work, changing how we calculate your profit-sharing plan payments, or reducing the amount of those payments—without first notifying the Union and giving it a reasonable opportunity to bargain with us concerning proposed changes.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL make affected unit employees whole for any loss of earnings and other benefits resulting from their layoffs, less any net interim earnings, plus interest, and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL make affected unit employees whole for any loss of earnings and other benefits suffered as a result of our unlawfully subcontracting unit janitorial work, plus interest.

WE WILL make affected unit employees whole for any loss of earnings and other benefits suffered as a result of our unlawfully changing or reducing their profit-sharing plan payments, plus interest.

WE WILL compensate affected unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards.

WE WILL file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each affected unit employee.

WE WILL file with the Regional Director for Region 3 a copy of each affected unit employee's corresponding W-2 form(s) reflecting the backpay award.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

All full-time and regular part-time Production and Maintenance employees employed by Respondent at its facility located at 4001 Packard Road, Niagara Falls, NY 14303, excluding all fire watch employees, office clerical employees, guards, professional employees and supervisors as defined in the Act, and all other employees.

WE WILL restore unit employees' terms and conditions of employment to what they were before we unlawfully changed them.

WE WILL display and otherwise share with you monthly profit information for the Niagara Falls, New York facility the same way we displayed and shared that information before the April 2019 representation election.

WE WILL L furnish to the Union in a timely manner the information requested by the Union on August 16, August 26, and September 3, 2019.

CASCADES CONTAINERBOARD PACKAGING --  
NIAGARA, A DIVISION OF CASCADES HOLDING  
US INC.

The Board's decision can be found at <https://www.nlrb.gov/case/03-CA-242367> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



(Jesse Feuerstein, Esq., for the General Counsel.  
Don T. Carmody, Esq. and Carmen M. Dirienzo, Esq., (Carmody  
and Carmody), of Katonah, New York. for the Charging  
Party.

## DECISION

### STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Buffalo, New York, on December 3, 4, and 5, 2019. The International Association of Machinists and Aerospace Workers, District Lodge 65, AFL-CIO (the Union or IAMAW or Charging Party) filed the initial charge on May 30, 2019, the second charge on June 25, 2019, and the third charge on September 27, 2019, and amended the third charge on October 3, 2019. The Regional Director for Region 3 of the National Labor Relations Board (NLRB or the Board) issued the initial complaint on August 6, 2019, the consolidated complaint on October 1, 2019, and the second consolidated complaint (the Complaint) on October 30, 2019. The complaint alleges that Cascades Containerboard Packing—Niagara, a Division of Cascades Holding US Inc. (the Respondent), in the immediate aftermath of employees voting to be represented by the Union: coerced employees in violation Section 8(a)(1) of the National Labor Relations Act (the Act) by telling them that the profit-sharing plan checks were being adjusted because employees voted to unionize; violated Section 8(a)(5) and (1) of the Act by failing to bargain before laying off employees, changing the terms of its profit-sharing plan, and subcontracting bargaining unit work, and by refusing to provide the Union with information regarding the profit-sharing plan; and violated Section 8(a)(3) and (1) of the Act by

discriminatorily changing the profit-sharing plan payments and ceasing to display profit-sharing information because employees formed the union and engaged in concerted activities. The Respondent filed a timely answer in which it denied committing any of the violations alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following Findings of Fact and Conclusions of Law.

### FINDINGS OF FACT AND ANALYSIS

#### I. JURISDICTION

The Respondent, a corporation, operates an office and place of business in Niagara Falls, New York (the Niagara facility) where it manufactures material for use in cardboard boxes, containerboard, and folding cartons. In conducting these business operations, the Respondent receives at the Niagara facility goods and services valued in excess of \$50,000 directly from points outside the State of New York. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

##### A. Background Facts

The Respondent operates a facility in Niagara Falls, New York, that consists of a paper mill and administrative offices. The Respondent's Niagara facility produces paper used in the construction of cardboard boxes. It is one of six paper mills that, along with 30 box-making plants, comprise the Cascades Containerboard Packaging (CCP) operation. In the overall corporate structure, CCP is "underneath a New York holding division." (Tr. at p. 423.) Above the holding division, and other Cascades entities, in the corporate structure is Cascades, Inc., which is headquartered in Quebec, Canada. *Ibid.*

Prior to April 2019, none of the employees at the Respondent's Niagara Facility were represented by a union. The Respondent employs approximately 145 workers at the Niagara facility, of whom between 108 and 115 are production and maintenance employees. Employees initiated a union organizing campaign at the facility in August 2018 and on April 26, 2019, the production and maintenance employees voted to be represented by the IAMAW/Union. On May 6, 2019, the Board certified the Union as the exclusive collective-bargaining representative of those employees.<sup>1</sup> At the time of trial—seven months following certification of the Union—the parties had not reached an initial collective bargaining agreement.

There is no allegation in the complaint that the Respondent violated the Act during the union campaign. Rather the Complaint focuses on the Respondent's actions immediately after the union campaign succeeded. On the evening of May 14, 2019—8 days after the Union was certified—the Respondent, by email,

<sup>1</sup> The unit is defined as:

All full-time and regular part-time Production and Maintenance employees employed by Respondent at its facility located at 4001 Packard

Road, Niagara Falls, NY 14303, excluding all fire watch employees, office clerical employees, guards, professional employees and supervisors as defined in the Act, and all other employees.

informed the Union that it would begin laying off unit employees less than a week later. The Respondent proceeded with the layoffs, on 2 consecutive weeks, starting on May 20. In June, the Respondent began meeting with employees about the profit-sharing payments that it makes to employees twice each year. During those meetings, the Respondent told employees that the profit-sharing plan payments they would receive had been changed due to the current situation at the facility. When asked, the Respondent told employees that the situation that led to the change was the advent of the Union. In addition, immediately after the union election, the Respondent abruptly ceased its longstanding practice of displaying, and otherwise sharing with employees, the monthly profit figures for the facility. Employees used those profit figures to estimate the amounts of the profit-sharing plan payments that they could expect to receive. The Union made an information request for information relating to the profit-sharing plan payments, but the Respondent refused to provide the Union with any of the requested information.

As discussed more fully below, in the weeks following the certification of the Union, the Respondent began using an outside contractor to perform janitorial work that had previously been performed by an employee-janitor who was in the bargaining unit.<sup>2</sup> The Respondent had employed a janitor for at least 23 years<sup>3</sup> prior to the Union's certification. The Respondent moved this work out of the bargaining unit without giving the Union notice and an opportunity to bargain about the action.

### *C. Respondent Lays Off Newly Unionized Employees*

Prior to the Union's May 6, 2019, certification, the Respondent had not resorted to an employee layoff at the Niagara facility in over 10 years and had done so just twice in approximately 20 years. On May 14, 2019, at 6:02 p.m. in the evening, the Respondent informed the Union, via email and attached memorandum, that management would lay off employees for 2 weeks beginning on May 20, 2019. This was the first time the Respondent notified the Union that it would be laying off the unit employees. The memorandum was from Normand LaPorte, the Respondent's general manager, to Richard Dahn, a union business representative, and stated:

Due to current market conditions, Cascades Containerboard Packaging-Niagara, a division of Cascades Holding US Inc. will begin a 2 week market down that will cause some bargaining unit employees to be temporarily laid off in accordance with a long established past practice at the facility. This is to begin May 20, 2019. As a result, a total of approximately 19 employees will be laid off during the first week of the shutdown, and a total of approximately 18 employees will be laid off for the second week of the shutdown.

<sup>2</sup> In the record, this work is sometimes referred to as janitorial work, and sometimes as custodial work. The record makes clear that both terms refer to the same work, and I use the term janitorial throughout this decision in the interests of clarity.

<sup>3</sup> Tr. 456–457 (Joseph Zilbauer, human resources manager, testifies that, prior to the union election, direct employees had performed the custodial work as long as he has been at the Niagara facility) and Tr. 395–396 (Zilbauer has been at the facility for 23 years)

<sup>4</sup> There had apparently also been non-layoff shutdowns of all or part of the facility, including one to permit a deep cleaning of the plant.

The Respondent's human resources manager, Joseph Zilbauer, testified that the Respondent had already made the decision to impose the layoffs at the time it sent the email notifying the Union. (Tr. 452–453.) LaPorte testified that the reason for the layoff was that, beginning in mid-March 2019, the Respondent's business had been slower than expected and the Respondent had reached its capacity for warehousing the accumulating unsold product. There was no evidence that the Respondent had lost any customers or had any orders cancelled during this time period and, in fact, Zilbauer testified that he had no knowledge that either of those things had occurred. (Tr. 450–451.) Both LaPorte and Zilbauer testified that the market conditions the Respondent relies on to explain the layoff were not so extreme that the Respondent considered going out of business at the Niagara location. (Tr. 359 and 449–450.)

At the time Dahn received LaPorte's email about the layoffs, Dahn was not in Niagara Falls, but rather attending a meeting in Chicago, Illinois. Ronald Warner, directing business representative, who was Dahn's superior in the Union, was also at the meeting in Chicago. On May 15, while at the meeting, Dahn showed Warner the email. At that time, the Respondent had not provided the Union with any information about which employees would be affected by the layoff, or how they would be selected.

Warner, upon his return to Niagara Falls on May 17, met with long-time Niagara facility employee Shawn Reed and asked him about the Respondent's past practice regarding layoffs. Reed told Warner that there was no past practice regarding layoffs and that, in fact, there had not been a layoff at the facility for many years. The record shows that the last layoff had been over 10 years earlier, and the next-to-last layoff had been about 10 years before that.<sup>4</sup> The record shows that the method by which the 2019 layoff was carried out was different than the way those two prior layoffs had been handled. To implement the prior layoffs, the Respondent had started by offering the most senior employees the opportunity to *volunteer* for the layoff. The Respondent would proceed by making the same offer to progressively less senior employees. The Respondent would impose the layoff on unwilling employees only to the extent that too few employees volunteered. On May 20, 2019, however, the Respondent laid off the 19 least senior unit employees, without attempting to lessen the burden on employees by seeking volunteers. The two prior layoffs and the May 2019 layoff were similar in that they were all premised on market conditions.

Warner, in a May 17 letter to Zilbauer, responded to the Respondent's May 14 email announcing the layoff.<sup>5</sup> In the letter, Warner stated that the Respondent had made a unilateral decision regarding a mandatory subject of bargaining, and further stated

<sup>5</sup> The Respondent attempts to give the impression that its officials did not know who Warner was when it received this May 17 letter from him. However, Zilbauer was clear that he knew since at least April 26 that Warner was an official of the Union and knew since May 6 that Warner was a business representative for the Union. (Tr. 403, 444–445.) I note, moreover, that while LaPorte testified that he did not even know what union represented employees at the time he saw the IAMAW's May 17 letter, he later backtracked from that claim – conceding that at that time he knew Dahn was an IAMAW official and represented the bargaining unit. Tr. 361.

that the Union was calling upon the Respondent to “cease and desist” until decisional and effects bargaining took place. Warner said that the Union was available to bargain “over the proposed change . . . on May 28 or 29.”<sup>6</sup> This letter, although sent several days before the Respondent began the layoff, was not delivered until the third day of the 2-week layoff. Upon receiving the letter, the Respondent did not “cease and desist” from laying off the unit employees until bargaining occurred, but rather proceeded with both weeks of the layoff. Nineteen unit employees were laid off for the first week, and 18 employees were laid off for the second week. Neither the Union nor the Respondent contacted the other by phone about the layoff during the days between the Respondent’s email and the start of the layoff.

LaPorte testified that the dates Warner offered for bargaining – May 28 and May 29 – were “too late,” but LaPorte did not offer any alternative dates to the Union. (Tr. 365.) On May 28 or 29, Dahn met with LaPorte, Zilbauer, and a human resources staffer, regarding an unrelated disciplinary matter. At this meeting, the Respondent raised the subject of the layoff, but Dahn stated that Warner, his supervisor, was handling that issue. On June 4, after the layoff ended, Warner had a phone conversation with LaPorte and Zilbauer. During that call, LaPorte stated that the reason for the layoff was that the Respondent had “a lot of warehouses with a lot of product.” During a meeting about the layoff on June 10, LaPorte told Warner that the “market conditions” that he cited in his memorandum to explain the layoff involved a surplus of warehouse inventory. On June 13—almost 2 weeks after the layoff ended—the Respondent first informed the Union which employees had been affected by it.

### C. Profit-Sharing Payments

#### 1. History of Profit-Sharing Payments

For over 20 years, the Respondent has made semi-annual profit-sharing plan payments to employees of the Niagara facility – once in June or July and once in December of each year. Employees receive these payments at the Niagara facility if they have been permanent employees for at least a year. The amounts of the semi-annual profit-sharing payments vary over time and between employees because the amounts are calculated based on variable factors including the profits of the Niagara facility and the other compensation the Respondent paid to the employee during the relevant period. The Respondent informed employees that the payments were calculated by setting aside a percentage of the facility’s profits for distribution to employees, and then determining each employee’s share of the set-aside amount based on that employee’s regular earnings during the relevant time period. Tr. 166–168, 193–194, 210–214. Zilbauer stated

that he had to check the employees’ eligible earnings to make sure that the profit-sharing payments were based on the correct information. (Tr. 425.) On two occasions prior to the Union’s certification, the Respondent informed employees that it was reducing the portion of the Niagara facility profits that would be set aside for distribution to employees. One of these occasions was in 2010 and the other in 2014.

The profit-sharing plan payments constitute a very substantial portion of the compensation that employees at the Niagara Facility receive. In 2018, for example, hourly employees received average total profit-sharing plan payments of \$15,662<sup>9</sup>—an amount equal to approximately 21 to 22 percent of the average of employees’ other annual wages at the time of trial.<sup>10</sup> Zilbauer testified that the Respondent considers the profit-sharing payments to be a “gift” to employees, not a term and condition of employment. He stated that the payments are a program of the head office of Cascades, Inc., in Canada, although he did concede that the Respondent was responsible for making sure that the wage information used to determine the payments was accurate and that all eligible employees were included. The Respondent has promulgated a “production working conditions manual” and a “maintenance employee handbook” that each reference the profit-sharing payments. Those documents, which pre-date the arrival of, and were not negotiated with, the Union, each state that “profit-sharing is a non-negotiable and a discretionary corporate program which can be modified or reviewed at any time by the Company.” The portions of these documents that the Respondent presented at trial do not state what is meant by “Company,” and, specifically, do not state whether this refers to the Respondent (Cascades Containerboard Packaging – Niagara), to Cascades Holding US or to the overall corporate entity headquartered in Canada. Respondent’s Exhibit Number (R Exh.) 8. I do note that headings on both documents make specific reference to the Respondent’s Niagara Falls operation. One heading is “Cascades Containerboard Packaging, Niagara Falls Division, Production Working Conditions Mutual Agreement 2018 & 2019.” The other heading is “Cascades New York, Inc. Niagara Falls Divisions Maintenance Employees Handbook.”

#### 2. June/July 2019 Profit-Sharing Plan Payments

Prior to when the Respondent makes the semi-annual profit-sharing plan payments to hourly employees, a supervisor meets with each employee to discuss the amount that the employee will receive. The Respondent then makes the profit-sharing payment to each employee either by disbursing a check to the employee or by direct deposit. At the time when supervisors met with individual Niagara facility employees about the upcoming

<sup>6</sup> The body of Warner’s May 17, 2019, letter read:

This letter is written in response to the Company’s letter dated May 14, 2019, signed by Normand LaPorte. The Company has made a unilateral decision to implement a layoff of the bargaining unit employees, who we represent. This is a change in the working conditions of the bargaining unit employees at Cascades. The Union hereby request[s] decisional and effects bargaining. The Union calls for a cease and desist of this practice until bargaining can take place. Please advise the Union as to when the Company will be able to bargain over the proposed change, we have availability on May 28 or 29, 2019. As you know, this is a mandatory subject of bargaining[ and] failure to

bargain on this subject would be considered a unilateral change, under the National Labor Relations Act. Please respond within two (2) business days of receipt of this certified letter, with how you would like to proceed.

<sup>9</sup> Joint Exhibit Number (Jt. Exh.) 2 shows that hourly employees’ average profit-sharing payments were \$6422 in June 2018 and \$9240 in December 2018 for a total of \$15,662 that year.

<sup>10</sup> According to LaPorte, general manager of the Niagara facility, the average yearly wages for hourly employees at the facility was \$68,000 to \$70,000. (Tr. 483.)



June/July 2019 payment – the first such payment since employees elected the Union as their bargaining representative—supervisors and other officials stated that the profit-sharing plan payments had been changed because of the current situation or “culture” at the Niagara facility. The supervisors read a script about the change from a hand-written note that management provided to them. The Respondent did not provide a copy of this hand-written note to the employees, and declined to do so when employees asked for it. This procedure diverged from the Respondent’s prior practice, which was that the supervisor would discuss a typed document regarding the profit-sharing plan payment and then provide a copy of that typed document to the employee, without the use of a handwritten script.

Zilbauer (human resources manager—a witness for the Respondent and a supervisor and agent—testified that Cascades’ regional human resources manager (Dave Guillemette) informed him that the July 2019 profit-sharing payments to employees at the Niagara facility were being changed because of the Union situation at the facility. (Tr. 426, 466–467.) Another supervisor, Robert Pozzobon, communicated that information to employees. When Pozzobon met with unit employee Gerald Cracknell to discuss the June/July 2019 profit-sharing plan payment, he told Cracknell that the “profit sharing had been adjusted due to the current conditions and situation in Niagara Falls.” (Tr. 140–142.) When Cracknell asked what “situation” Pozzobon was referring to, Pozzobon stated that the “situation” was “the Union.” Ibid. Similarly, when Pozzobon met with unit employee Randy Butski in June about the profit-sharing plan payment, Pozzobon told him that “due to the current culture of the Niagara Falls mill, we were forced to reduce your profit-sharing check.” (Tr. 179.) When Butski asked Pozzobon what he meant by the current culture, Pozzobon responded, “if you’re asking me, it’s because of the Union.” (Tr. 197–198.)<sup>11</sup>

Pozzobon also met with unit employee Reed about the June 2019 payment, and told Reed that there had been an adjustment to the payment because of the “current situation” at the facility. Reed asked whether the Respondent’s other facilities were affected by the adjustment, and Pozzobon responded “no, only ours.” (Tr. 219–221.) Reed testified that he did not ask Pozzobon what “current situation” led to the adjustment since he considered it obvious that Pozzobon was referring to the recent certification of the Union because that was the only situation that had changed. (Tr. 221.) Given that this was the first profit-

sharing payment after the Union was certified, that the Respondent diverged from its usual procedure by providing supervisors with a handwritten script that was not shared with employees, that Pozzobon stated that payments at other facilities were not being adjusted, and that no other “current situation” was identified by Pozzobon, I find that it was reasonable for Reed to understand that the recent union activity was the “situation” to which Pozzobon was attributing the change in profit-sharing plan payments.

### 3. Respondent Ceases Sharing the Monthly Profit Information that Employees Relied on to Estimate the profit-sharing payments

For approximately 10 to 15 years, the Respondent shared monthly profit figures for the Niagara facility with employees. Employees used this information to estimate the amount of their next semi-annual profit-sharing payment. The Respondent displayed the monthly profit figures in the office of Chris Marlowe (assistant controller) where they could be viewed by employees. Sometimes supervisors also conveyed this information to employees orally.

The record shows that immediately after the union election, the Respondent stopped displaying and otherwise sharing the monthly profit information with employees. Butski asked Marlowe for the information, but Marlowe told Butski that she was no longer permitted to display the information. Cracknell asked LaPorte (general manager) why the monthly profit figures were no longer being shared with employees and LaPorte answered “because there’s a third party involved.” Another employee, Reed, also asked LaPorte why the facility’s profit information was no longer being shared with employees. LaPorte responded, that “the Union had proven that they can’t be trusted with important information.” Reed told LaPorte that he was asking for the information on his own behalf, not on behalf of the Union. LaPorte still refused to provide the information to Reed.

At trial, LaPorte admitted that the Respondent stopped providing the profit information because of a flyer that he received from a supervisor on the day before the union election. LaPorte himself was the subject of the flyer. The flyer expressed skepticism about LaPorte’s academic history and also set forth information about the value of two of LaPorte’s residences.<sup>12</sup> The flyer gave the addresses of each of these residences, and identified LaPorte’s spouse by name as a co-purchaser of one of them. LaPorte testified that this flyer was a “big disappointment” and

<sup>11</sup> Butski’s testimony that Pozzobon had made this statement about the Union being the reason for the reduction of his profit-sharing payment was clear and certain. Pozzobon did not deny making this statement, although he did state that he could not remember whether he had met with Butski at all. (Tr. 289–290.) Since Pozzobon denied neither that the meeting with Butski took place, nor that he had made the statement about the Union to Butski, I find that Butski’s otherwise credible testimony on this score is uncontradicted and I credit that testimony. In addition, Pozzobon was evasive on the subject of his statements to Cracknell about changes to the profit-sharing payments. For example, Pozzobon denied, under oath, that during his meeting with Cracknell he used “words to the effect” that the payments had been “adjusted” due to current circumstances. Tr. 287. However, Pozzobon then conceded that he *had* told Cracknell that the payments had been “affected” due to current circumstances. Ibid. Pozzobon also denied that he told Cracknell that the

payments had been adjusted because of the Union, Ibid., but as shown by the above, Pozzobon was drawing a distinction between using “words to the effect” that the payments had been “adjusted” and using words to the effect that the payments had been “affected.” Pozzobon never denied that he told Cracknell that the payments had been affected (or changed or reduced or modified) because of the Union. Therefore, I consider Cracknell’s clear, certain, and credible testimony that Pozzobon identified the Union as the reason for a change in the profit-sharing plan payment to be un rebutted. To the extent that Pozzobon’s testimony can be seen as a denial on this point, I credit Cracknell over Pozzobon given Pozzobon’s evasiveness.

<sup>12</sup> LaPorte testified, without contradiction, that he rented, rather than owned, one of these residences. This is not inconsistent with the information in the flyer, which does not claim that LaPorte owned that property.

that he was particularly troubled by it due to his bad experience approximately 18 years earlier with a different union at a different company in Canada.

The flyer discussing LaPorte was entered as an exhibit at trial. Although LaPorte testified that the flyer made him feel that the Union had “disrespected” him, the Respondent does not assert that the Union claimed responsibility for the flyer, nor did the Respondent present testimony from anyone who claimed to have witnessed union-affiliated individuals distributing it. No witness claimed to have knowledge regarding the creation of the flyer.<sup>13</sup> The flyer itself makes no reference to the Union or the union campaign. The flyer is undated, and the most recent year referenced within it is 2017, well before the union campaign began in August 2018. At trial, LaPorte testified that he *assumed* that the Union was responsible for the flyer, but he stated that he did not attempt to determine whether this was true or not. Tr.375-376. When Reed asked LaPorte about the Respondent’s decision to withhold the profit information from employees, Reed stated that he was not involved with the flyer. During a bargaining session, the Respondent complained about the flyer, and the Union representatives who were present neither claimed credit for the flyer nor denied involvement with it. I find that the Respondent did not have a reasonable basis for concluding that the Union, or anyone acting on its behalf, was responsible for the flyer. LaPorte testified that after receiving the flyer he complained about it to Luc Pelletier (LaPorte’s superior in the Cascades organization), Karen Jaben (a vice president) and Guillemette (regional human resources manager).

LaPorte testified that the flyer was indirectly referenced in an April 29, 2019, memorandum from the “CCP Niagara Management Team” (the members of which the memorandum does not identify) to employees of the Niagara facility. The April 29 memorandum begins by stating that management was “disappointed at th[e] news” that a “slight majority” of employees had voted for union representation. The memorandum states that the Respondent would, nevertheless, “respect the outcome.” Then the memorandum goes on to state:

Based on the past days experience, it is concerning to us how this union has taken sensitive information and used it to put together an adversarial campaign including personal attacks. In Niagara Falls, we have shared, until now, a good deal of sensitive and private information with our employees, such as profits, that we may not be comfortable to share the same way anymore. If you have any questions, please do not hesitate to ask us.

LaPorte testified that this memorandum represented the notice he received directing him to cease sharing monthly profit figures with employees. Tr. 381-382. I find, however, that the memorandum does not direct LaPorte to cease sharing the profit information. Rather it states that management “*may not be comfortable to share*” the information in “*the same way anymore*.”

<sup>13</sup> Counsel for the Respondent claims in the Respondent’s brief that unit employee “Reed knew that the Union had distributed a flyer with personal information about LaPorte.” (R. Br. at p.18, citing Tr. 235.) This misrepresents the record. In the cited testimony, Reed does not state

(Emphasis Added). Moreover, it is not clear who specifically the memorandum came from, or even whether it came from anyone above LaPorte in the Cascades organization. In addition, I find that there was no showing at trial that the flyer regarding LaPorte included any information that was not publicly available or that would only have been available to the creator of the flyer because the Respondent shared the information with employees or the Union. To the contrary, the flyer specifically identifies public sources (Zillow.com, Realtor.com, Social Media) for the information. The profit figures that the Respondent has ceased sharing with employees were not referenced in the flyer in any way.

Regarding the evidence surrounding the Respondent’s decision to stop sharing the monthly profit information, I found LaPorte to be a biased and highly unreliable witness based on his testimony and demeanor. He strained unconvincingly to distance himself from the decision to stop sharing the monthly profit information with employees. He repeatedly asserted that he took the action only at the direction of higher ups in the organization, see, e.g., Tr. 352–353, 378, but, as discussed above, the memorandum that he says directed him to cease sharing the profit information, does not, in fact, direct him to do that. It was not even demonstrated that LaPorte, the highest on-site official at the Niagara facility, was not a member of (or even the only member of) the “CCP Niagara Team” who issued it. Indeed, when LaPorte was asked at trial to explain the memorandum he said “we decided to publish a communication to all the employees, and it happened after the election” (Tr. 344) (emphasis supplied) – thus indicating that it was a directive *from* LaPorte, not *to* him from upper management. The Respondent did not introduce documentation in which any official from outside the Respondent directed LaPorte to stop sharing the information. At any rate, if Cascades officials beyond the Niagara facility had decided that because of the flyer the profit information should no longer be shared with the employees, the evidence shows that they would have been doing so in response to LaPorte’s complaints blaming the Union for the flyer. (Tr. 351–352, 378.)

LaPorte’s effort to avoid responsibility for the decision to withhold profit information from his workforce became even more far-fetched when he claimed that not only had he been directed to stop sharing the profit information, but that he would not have been capable of sharing the information even if he wished to do so, because he himself no longer had access to it. Tr. 381-382. Given that LaPorte was the general manager of the facility and was responsible, in own words, to “manage sales, accounting, production, quality,” in order “make a successful” operation at the Niagara facility, Tr. 313, it is implausible that he would not have access to profit information for the facility. LaPorte claimed not only that he was now managing the facility without the profit information that had until recently been shared with the entire workforce, but he testified that he had never even asked for that information. Tr. 381 at lines 11 to 19; Tr. 382 at lines 8 to 12.<sup>14</sup> LaPorte’s willingness to make such an

that he knew who created or distributed the flyer or anything about it. In fact, he testified that he had never even seen the flyer.

<sup>14</sup> LaPorte definitively testified at one point that he never asked for the profit information for the Niagara facility, but he subsequently stated that

implausible claim under oath reflects poorly on his honesty and reliability as a witness. Indeed, the Respondent's counsel apparently recognized this and, during a subsequent re-direct examination, helped LaPorte change his answer. Tr.383-384. Specifically, under questioning by the Respondent's counsel, LaPorte acknowledged that, contrary to his earlier claim, he did continue to have access to the profit information for the Niagara facility, even after he stopped sharing that information with employees following the union election. *Ibid.*

Based on the record evidence discussed above, I find that the LaPorte and the Respondent were responsible for ceasing the longstanding practice of sharing the Niagara facility's monthly profit information with employees.

#### 4. Union Information Request Regarding Profit-Sharing

As mentioned above, in June and/or July of 2019, during meetings regarding the first postcertification profit-sharing plan payments, the Respondent told employees that their profit-sharing plan checks had been changed due to the current situation at the Niagara facility. Pozzobon and Guillemette stated that the Union was the reason for these changes. Unit employees alerted the Union that the Respondent was stating that the Union was the reason that profit-sharing plan payments had been changed. The Union had no information from the Respondent regarding the formula used to calculate the profit-sharing plan payments or of the change to those payments. In a letter from Warner to Zilbauer, dated August 16, 2019 (and received on Aug. 18), the Union requested information relating to the profit-sharing plan payments and the changes that the Respondent was telling employees had been made. The letter also asked the Respondent to resume its longstanding practice of sharing monthly profit information for the Niagara facility with employees. The letter reads in relevant part:

- I. Please provide the detailed formula for how the Profit Share that the Cascades bargaining unit employees receive, is figured. This profit share is referenced in both employee handbooks that you provided. We need this formula for each of the past three years; 2017, 2018 and 2019, including any changes in the formula that may been implemented in these years.
- II. Please provide the actual amount of profit share checks that each bargaining unit employee received for the past three-year period 2017, 2018 and 2019. Also seeking the average amount paid out each period. We understand that this is distributed two times a year, so we are seeking the past 6 check amounts.
- III. Understanding that the Profit Share is distributed two times a year. Please provide the time period that is used in the determination of the amount of the profit share as well as when the checks are paid out to the employees. (example; January – June time period and paid out 2<sup>nd</sup> week of July?)
- IV. Please provide the monthly profit statements which Cascades stopped posting for the bargaining unit employees in April 2019. We are seeking the profit statement for April, May, June, and July, as well as August statement when that month

becomes available. The Union additionally requests Cascades to continue to post these profit statements on a going forward basis, as this has been the historical practice prior to the organizing campaign.

Warner's letter stated that the information was "essential to bargain intelligently on the issues of wages and working conditions in the forthcoming negotiations."

As of August 26, 2019, Warner had received no response at all to the information request sent 10 days earlier. Warner sent a second letter to Zilbauer regarding the matter. This one was dated August 26, referenced the August 16 request, and repeated the same information requests. On September 3, Zilbauer sent an email message to Warner regarding the Union's request. Zilbauer stated that the Respondent would not provide the Union with *any* of the requested information. Instead, Zilbauer asserted with respect to each and every information request in the Union's letter that "the relevance of the information being sought . . . is not evident." With respect to information request paragraphs I and III, Zilbauer also made a conclusory statement that the requested information was "confidential and proprietary." Warner responded by letter dated September 6. Regarding the Respondent's contention that the relevance of the information sought was "not evident," Warner stated:

Although we have already done so, to further clarify, the profit share has historically been part of the benefits that employees that we now represent have received as part of their compensation. As such it is part of the terms and conditions of their employment. Therefore, we are entitled to this information under National Labor Relations Act.

The Respondent did not respond to Warner's September 3 letter, and did not provide any information at all in response to that letter and the information requests.

#### 5. Change to the Profit-Sharing Plan Payments, Who Made the Changes, and Adverse Inference

Pozzobon, an admitted supervisor and agent of the Respondent,<sup>15</sup> told employees that the June/July 2019 profit-sharing plan payments had been reduced and changed. Zilbauer, another admitted supervisor and agent,<sup>16</sup> testified that the June/July profit-sharing plan payments had been changed. In addition, unit employees Cracknell and Reed both testified that the June/July payment was about \$1000 lower than what they should have received. Although, in its pleadings, the Respondent denied that it had altered the profit-sharing plan payments, it presented no testimony or other evidence to contradict the statements of Pozzobon, Zilbauer, Cracknell, and Reed, that the payments had, in fact, been changed. I find that there was a change to the profit-sharing plan payments that the Respondent disbursed to unit employees in June/July 2019.<sup>17</sup>

I also find that the Respondent did not provide the Union with notice or an opportunity to bargain before reducing the June/July profit-sharing plan payments to bargaining unit employees.

"maybe" he had asked for a "guesstimation" of the profit information. (Tr. 382.)

<sup>15</sup> See GC Exh. 1(x-1) at par. 5 (Respondent's amended answer to complaint).

<sup>16</sup> *Ibid.*

<sup>17</sup> For this reason, I deny the Respondent's motion to dismiss the claims relating to the profit-sharing plan. In that motion, the Respondent argued that no change had been shown.

Warner credibly testified that the Respondent did not notify the Union. Tr. 42. Zilbauer, the human resources manager and a witness for the Respondent, testified that he knew about the change, but did not notify the Union. Tr. 467. The Respondent presented no evidence showing that it provided the Union with notice or an opportunity to bargain before making the change. Indeed, it maintains that it had no obligation to do so.

The record evidence does not establish exactly how much the profit-sharing plan's operation was changed. This is not surprising given that the Respondent failed to produce information properly sought in the General Counsel's subpoena duces tecum regarding, inter alia, the formulas/calculations that the Respondent used to arrive at the profit-sharing amounts and the Respondent's internal communications regarding the profit-sharing plan payments. This failure continued even after I denied the Respondent's petition to revoke the General Counsel's subpoena and directed the Respondent to produce the information.<sup>18</sup> There was, however, the credible testimony of Cracknell and Reed that the June/July payment had been reduced by about \$1000. The Respondent did not provide any information to show that the change to the profit-sharing plan payments was less consequential than that.

At trial, the General Counsel made a motion for the imposition of a range of evidentiary sanctions to address the Respondent's failure to comply with the General Counsel's subpoena for information relating to the profit-sharing plan even after I directed the Respondent to do so. I reserved ruling on that motion at trial, and now grant the motion to the extent that I find that the Respondent's contumacious refusal to produce plainly relevant records properly subpoenaed by the General Counsel warrants drawing an adverse inference against the Respondent on the questions of: (1) whether the profit-sharing payment to unit

employees were calculated based, in whole or in part, on the Niagara facility's profits and the other earnings of the particular recipient during the relevant time period; (2) whether the change made to the operation of the profit-sharing plan in June/July 2019 was substantial, and (3) whether the Respondent was responsible for the change. See *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 1 fn. 1, and at 15 fn. 29 (2018), enf'd. 779 Fed.Appx. 752 (D.C. Cir. 2019); *Sparks Restaurant*, 366 NLRB No. 97, slip op. at 10–11 (2018); *Metro-West Ambulance Service*, 360 NLRB 1029, 1030 and n. 13 (2014); *McAllister Towing & Transportation*, 341 NLRB 394, 396–397 (2004), enf'd. 156 Fed.Appx. 386, 388 (2d Cir. 2005).

Generally, a party must produce subpoenaed information as long as it is, or could lead to evidence, potentially relevant to the complaint allegations. See NLRB Rules and Regulations, Sec. 102.31(b); *McDonald's USA, LLC*, 363 NLRB No. 144, slip op. at 15 (2016). At trial, the Respondent's counsel forwarded a variety of meritless arguments<sup>19</sup> in an effort to justify its refusal to produce the subpoenaed profit-sharing information that was highly relevant to the allegations that the Respondent discriminatorily and unilaterally changed that benefit. After I spent a significant amount of time addressing the Respondent's arguments to justify withholding the information, and after I rejected those arguments and directed production, the Respondent's counsel, stunningly and abruptly, changed course and asserted that the Respondent simply did not have the subpoenaed information and therefore could not produce it regardless of whether the Respondent had a valid basis for withholding it. If that were true, the Respondent's counsel no doubt would have said so at the outset rather than making lengthy written and oral attempts to justify the Respondent's decision to withhold information that it subsequently claimed it never had in the first place.<sup>20</sup>

<sup>18</sup> The Respondent never produced information regarding the profit-sharing plan formulas and calculations. The only production it made regarding the plan was on the last day of the hearing when it provided recently prepared summary documents listing amounts that employees received over a 3-year period. It did not provide the underlying documents or any other material that would reveal how the amounts were calculated or changed.

<sup>19</sup> For example, Attorney Carmody, the Respondent's counsel, argued that he did not have to provide subpoenaed information regarding the profit-sharing plan because changes to the plan could not be an unfair labor practice inasmuch as the plan was a "gift" rather than a term or condition of employment. (Tr. 300.) Although Carmody is certainly entitled to argue to the Board that the profit-sharing plan is not a term or condition of employment, it is improper conduct for him to make that determination for the Board and, on that basis, decline to comply with a valid subpoena for information relevant to adjudication of the issue, especially after I directed him to do so. Worse yet, Carmody did not initially disclose that he was withholding information on his own authority in this manner. He only admitted to doing so after a document responsive to the subpoena came to light, and he was questioned as to why he had not produced it. The work of attorneys who appear before the Board would be much easier if rather than presenting arguments to the Board they could, as Carmody seems to think he can, simply make the rulings themselves and in favor of their own clients.

Also without merit is Carmody's argument that the Respondent should not be required to comply with the General Counsel's subpoena because it seeks some of the same information at issue in the Complaint allegation relating to the Union's information request. I agree that if the

information request claim was the only alleged violation in this case, the General Counsel would not have a legitimate need for the information in advance of the Board order being sought and could reasonably be seen as improperly attempting to use the subpoena as substitute for such an order. See *Electrical Energy Services*, 288 NLRB 925, 931 (1988). In this case, however, the General Counsel's subpoena clearly has a legitimate purpose, and is not improper, since it seeks information that is relevant to the Complaint allegations that the Respondent discriminatorily and unilaterally reduced employees' profit-sharing payments. The General Counsel is seeking a Board order, unrelated to information production, to remedy harm employees allegedly suffered as a result of such violations. The production of information necessary to litigate those separate issues in no way undercuts, and in fact undergirds, the statutory requirement for a hearing on the ultimate issue.

<sup>20</sup> Carmody also asserted that the provincial law of Quebec, Canada – one of the ten provinces in Canada's federal system – includes a "blocking" provision that justifies the Respondent withholding the subpoenaed material, even though the instant proceeding is taking place before a United States federal agency, under United States federal law, and addresses the allegedly unlawful treatment of employees working in the United States. Carmody made this argument without even bothering to provide the text of the foreign provision that supposedly justified withholding relevant evidence. Instead Carmody provided only his own paraphrasing of the foreign law with some selective quotes to its language. Carmody did not provide the testimony or opinion of any counsel admitted to practice in Quebec, or with expertise regarding Canadian law, to support his assertions regarding the operation of the Quebec provincial provision he paraphrases. Nor did he present any evidence showing that

In reaching the conclusion that an adverse inference is an appropriate sanction, I considered the Respondent's assertion that the subpoenaed information was not in the possession of the Respondent, but rather in the possession of the Respondent's parent corporation in Canada, which is not named in the complaint. I consider the claim of Respondent's counsel that the management of the Niagara facility did not possess any of the requested information to be specious. The Respondent did not show that it had made a reasonable search of its records, but had failed to find the subpoenaed information. Moreover, as noted above, counsel only resorted to claiming that the Respondent did not possess the information after losing his bid to justify withholding that information. I note, moreover, that when the Respondent answered the Union's information requests for information about the profit-sharing plan, the Respondent did not claim that it lacked such information, but rather refused to provide the information based on assertions that the information was not relevant and/or was confidential and proprietary. General Counsel Exhibit Number (GC Exh. 6.)

Moreover, the Respondent's production obligation extends not only to information in its immediate possession, but also to information that it could obtain from other persons or companies. See *Clear Channel Outdoor, Inc.*, 346 NLRB 696, 702 fn. 10 (2006) ("[i]n responding to a subpoena, an individual is required to produce documents not only in his or her possession, but any documents that he or she had a legal right to obtain"); see also *Winthrop Management*, 2018 WL 834316 at fn. 2 (Board Order Regarding Petition to Revoke Subpoena). The subpoena apprised the Respondent of the obligation to provide information that was not in its immediate possession or control, but which was in the possession of an entity "connected with you." See Respondent Exhibit Number (R Exh. 1), Attachment 1 (Subpoena), Definitions and Instructions pars. 2 and 10.

The Respondent's counsel did not call a custodian of records

the Respondent had requested the information from its corporate parent but that the corporate parent refused to provide the information based on Quebec provincial law. The U.S. Supreme Court addressed the type of argument made by Carmody here in *Societe Nationale Industrielle Aerospatiale v. United States District Court*, and there stated that "[i]t is well settled that [foreign blocking] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute." 482 U.S. 522, 544 fn. 29 (1987). The Respondent cites no cases in which federal courts have held that, contrary to *Aerospatiale*, the federal law of the United States must, in a federal proceeding regarding the treatment of employees in the United States, yield to the Quebec blocking statute. Carmody relies on two federal district court cases in which the Quebec blocking statute was discussed in the context of privately brought asbestos litigation where the information at-issue was sought from a nonresident company that manufactured asbestos in Canada. Notably, even in those federal asbestos cases cited by the Respondent, both district courts *did* compel production of subpoenaed information despite the Quebec provision. See *Central Wesleyan College*, 143 F.R.D. 628, 644–646 (D. S.C.1992), judgment affirmed by 6 F.3d 177 (4th Cir. 1993) and *Petruska v. Johns-Manville*, 83 F.R.D. 32 (E.D.Pa.1979). Moreover, production was compelled in those cases even though the rationale for doing was not nearly as strong as it is in the instant case since here the information is being sought in a case brought by a United States federal agency seeking production from a United States employer regarding its allegedly unlawful treatment of United States workers at a United States

to substantiate that the Respondent either searched its own records for, or sought unsuccessfully to obtain from within the Cascades organization, the relevant profit-sharing information that I directed it to produce.<sup>21</sup> Even more disturbing is the fact that the Respondent's counsel failed to present the testimony of the custodian of records after assuring me that he would do so. (Tr. 255.) In the end, there was no record evidence that the Respondent made any search at all for the highly relevant information that was properly subpoenaed by the General Counsel and which I directed the Respondent to provide.

The Respondent's conduct regarding the subpoena issues demonstrates contempt for the Board's processes and authority under federal law. Allowing the Respondent to escape scrutiny of its alleged violations by withholding relevant information properly subpoenaed by the General Counsel would frustrate the purposes of the Act. Therefore, it is appropriate to draw the adverse inferences articulated earlier.

I find that: the profit-sharing payments were calculated based, at least in part, on a percentage of the Niagara facility's profits and the particular recipients' earnings; that the payments made to unit employees in June/July 2019 were substantially reduced; and that the Respondent was responsible for this reduction. My decision to grant the General Counsel's motion to the extent of drawing adverse inferences should not be construed as a conclusion that such an adverse inference is necessary to these findings. I would have found a substantial change was made to payments and that the payments were based on employment-related factors such as the employee's other wages based, inter alia, on the un rebutted testimony of Zilbauer that a change was made and that he had to check the employees' other wages to make sure the profit-sharing payments were correct, and the testimony of employees that the profit-sharing payments were calculated based on the facility's profits and the employee's earnings and that the June/July payment was reduced by approximately \$1000.<sup>22</sup>

facility. Board precedent in analogous cases involving state law limitations on disclosure establishes that in Board proceedings federal law overrides contrary local law restrictions. See, e.g., *R. Sabee Co.*, 351 NLRB 1350 n. 3 (2007), and cases cited there. It is clear under *Societe Nationale Industrielle Aerospatiale v. United States District Court*, supra, and the other precedent set forth above, that the Quebec local provision relied on by Respondent cannot do what even the state and local law of the United States could not do—that is, override the Board's authority under federal statute to obtain information highly relevant to allegations that the Respondent violated the federal rights of United States employees.

<sup>21</sup> LaPorte and Zilbauer testified, but the Respondent did not suggest that either was the custodian of records. At any rate, neither LaPorte nor Zilbauer testified that they conducted or oversaw a reasonable search for the subpoenaed information, nor did they claim that they asked for the records from the Respondent's parent corporation, the holding company, or some other part of the Cascades organization.

<sup>22</sup> I reference the \$1000 figure as an approximation. Calculation of the exact amounts lost due to any violations would be a matter for a compliance proceeding. See, e.g., *Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 330 NLRB 1043, 1049 (2000) (where employer refused to provide documentation showing how much employees lost in profit-sharing payments, the calculation of those amounts would await a separate compliance proceeding), remanded on other grounds, 258 F.3d 305 (4th Cir. 2001); *Champ Corp.*, 291 NLRB 803, 805 (1988) (Board leaves to the compliance stage the calculation of lost profit-sharing and other

In addition, even apart from the adverse inference that the Respondent bore responsibility for the reduction to the profit-sharing payments, I believe that the record indicated that the Respondent did bear such responsibility. The record shows that the Respondent was the employer of the unit employees to whom the profit-sharing payments were made, was responsible for disbursing the profit-sharing payments, and was responsible for making sure that the profit-sharing payments correctly reflected the employee's earnings and eligibility. The Respondent was the one who communicated with employees regarding the payments and told them that the payments had been changed because of the Union. The Respondent introduced no documentation to substantiate the self-serving testimony that the Respondent itself had no role in, or control over, how much profit-sharing compensation it distributed to its own employees. Similarly, the Respondent did not present testimony from officials elsewhere in the Cascades organization to support the suggestion that such officials, rather than the Respondent's own managers, were responsible for reducing the payments to Respondent's employees, and that this decision was made without the participation of the Respondent. Not only did the Respondent fail to identify such officials, but by refusing to produce the subpoenaed information about the profit-sharing plan calculations and internal communications, the Respondent inhibited the Board's ability to identify and meaningfully question responsible officials. The Respondent's assertion that it bore no responsibility for changes to the payments the Respondent made to its own employees is especially unworthy of credence since the changes were, according to the Respondent's statement at the time it disbursed the payments, made only at the Respondent's facility and in response to the employees' decision to unionize at the Niagara facility. It is implausible that the Respondent's corporate parent in Quebec would retaliate in this way against employees at one of its dozens of facilities without significant input and involvement from management at the facility being singled out. In reaching this finding, I considered the fact that LaPorte denied that the Respondent had any responsibility for reducing the payments. However, for the reasons previously discussed I found LaPorte to be unusually lacking in credibility. See, *supra*, sec. II.C.3., and fn. 5. LaPorte gave wholly implausible and contradictory testimony in an effort to avoid acknowledging responsibility for the treatment of his employees. Based on this, and the record as a whole, I do not credit LaPorte's testimony denying that the Respondent was responsible for changes to the profit-sharing payments.

#### *D. Janitor Work*

##### 1. History of the Respondent's use of an employee to perform janitorial work on a full-time basis

For at least 23 years, the Respondent employed an individual to perform janitorial services for the "mill" portion of the Niagara facility. The janitor's duties extended to the entire facility, with the exception of the administrative offices. The janitor's shift was from 5:30 am to 2 p.m., during which time the

employee generally was engaged full-time in cleaning the general production areas, the conference rooms, the lunchroom, the bathroom, the locker room, and the showers. Janitorial services for the administrative offices have historically been performed primarily by an outside contractor. The mill area of the facility cleaned by the employee-janitor was characterized by a witness as "massive" compared to the administrative offices cleaned by the contractor. (Tr. 455.)

The Respondent's janitor and the outside contractor occasionally substituted for one another. When the contractor was on vacation, the janitor would clean the administrative offices. (Tr. 185.) Similarly, when the janitor was on vacation—5 to 6 weeks annually—the Respondent usually had the contractor clean the mill areas, although the Respondent also sometimes assigned the janitor's work to one of its own employees. On occasion the Respondent's janitor would perform safety audits at the facility, and this would take the janitor away from his or her janitorial duties for a matter of days or as much as a week. During such times the Respondent had the outside contractor clean the mill area.

##### 2. Jackson leaves janitor position and the Respondent permanently assigns his janitorial work to the outside contractor

For 10 years, Steve Jackson was the Respondent's employee-janitor. Jackson was an undisputed member of the bargaining unit. In May 2019, shortly after the election, Jackson voluntarily ended his employment with the Respondent.<sup>23</sup> Within 2 weeks of when Jackson left the Respondent, management assigned Jackson's janitorial work in the mill to the outside contractor. Since then, the Respondent has relied solely on the contractor to perform that work.

The Respondent did not give the Union notice or an opportunity to bargain before permanently assigning the bargaining unit janitorial work to the outside contractor. When the Union learned that the bargaining unit janitorial work had been subcontracted, Warner, in a June 4, 2019, letter to Zilbauer, stated that "hir[ing] a subcontractor to fulfill the job duties of the Custodian/Janitor position" constituted a unilateral change. Warner's letter asked the Respondent to cease and desist, to "hire a full time employee into this bargaining unit position," and to engage in decisional and effects bargaining with the Union. On June 21, Warner wrote to Zilbauer a second time regarding the janitorial position. Warner reported a discussion during which Zilbauer told him that the Respondent was "not sure" it would fill the janitorial position. Warner reiterated his demand that Zilbauer fill the position. In a June 27 email to Zilbauer, Warner described a conversation in which Zilbauer acknowledged that a contractor had taken over the work of a bargaining unit position. He also referenced the Respondent's interest in "swapping" a new unit position for the janitor position. Warner indicated that while the Union might be open to discussing that during future negotiations, it was first necessary for the Respondent to restore the status quo by filling the bargaining unit position.

Zilbauer responded to Warner by email on July 2, 2019.

monetary relief), *enfd.* 933 F.2d 688 (9th Cir. 1990), *cert. denied* 502 U.S. 957 (1991).

<sup>23</sup> Although Jackson's departure came shortly after the election of the Union, it does not appear that his decision was motivated by the election

results. The record shows that Jackson was on the organizing committee. Tr. 52.

Zilbauer told Warner that the Respondent was planning on posting the janitor position that day so that unit employees could apply. From July 2 to July 9, the Respondent did, in fact, post an invitation for its employees to apply. Ten-unit employees signed the Respondent's posting to express their interest in filling the janitorial position. However, July and August passed without the Respondent offering the position to any employee. In a September 5 email, Warner told Zilbauer that he was aware that the position had not been filled. He stated, in addition, that employees were reporting that Zilbauer had told them the Union would not allow the Respondent to fill the position. Warner asked Zilbauer to stop placing blame on the Union for the Respondent's failure to offer the position to the employees. Warner also asked Zilbauer to let the Union know the Respondent's "intentions on filling the Janitor position." Zilbauer responded by email on September 9. Rather than offering to bring the work back within the bargaining unit, or explaining why the Respondent had failed to fill the position during the 2 months since posting the opening for bids, Zilbauer told Warner that during contract negotiations the Union could propose that the company agree to "change our past practice, and consent to an absolute obligation to fill any and all vacancies." In addition, the Respondent was interested in the possibility of contract negotiations on the subject of eliminating the janitor job as a bargaining unit position in exchange for the creation of a different bargaining unit position. In a September 23 email to Zilbauer, Warner recounted that, during contract negotiations, Zilbauer stated that the Respondent was not going to fill the janitor position. Warner opined that this was a violation of the National Labor Relations Act and that the Union would be "seeking a decision from the NLRB." At the time of trial, the Respondent was still relying solely on the contractor to perform the janitorial work for the mill.

#### Discussion

##### 2.. Section 8(a)(1): Respondent's statements that profit-sharing plan payments were being reduced and changed due to the Union

In June and/or July 2019, shortly after the Union was certified, Pozzobon, a supervisor and agent of the Respondent, told unit employee Butski that his profit-sharing plan check had been reduced and that the reason for this was the union situation at the facility. Similarly, Pozzobon told unit employee Cracknell that the profit-sharing plan payment had been changed as a result of the Union. The General Counsel alleges that these statements violated Section 8(a)(1) of the Act. Section 8(a)(1) makes it unlawful for an employer to make statements that "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by the Act. A violation of this provision occurs when the employer makes a remark that has "a reasonable tendency, under all the circumstances, to interfere with, restrain, or coerce employees in the exercise of their . . . rights" under the Act. *Roemer Industries*, 367 NLRB No. 133, slip op. at 1 fn. 2 (2019). I find that a reasonable employee would tend to be coerced in the exercise of their rights under the Act by the Respondent's

statements, shortly after employees voted for union representation, that employees' compensation was being changed and reduced because of the union situation. The Board has reached this conclusion in analogous cases. In *Holland American Wafer Co.*, the Board held that an employer unlawfully coerced employees' exercise of their statutory rights in violation of Section 8(a)(1) by telling them it was withholding wage increases because the employees had voted to be represented by a union. 260 NLRB 267, 271–272 (1982). In *Gorman Machine Corp.*, the Board held that an employer made coercive statements in violation of the Act when it told employees that their overtime work was being eliminated because they had voted to be represented by a union. 257 NLRB 51, 58–59 (1981), *enfd.* in relevant part by 682 F.2d 11 (1st Cir. 1982).

I find that the Respondent violated Section 8(a)(1) of the Act in June and/or July 2019 when it told employees that their profit-sharing plan payments had been reduced and changed because of the union situation at the facility.

##### II. SECTION 8(A)(5) AND (1): RESPONDENT LAYS OFF BARGAINING UNIT EMPLOYEES FOR 2 WEEKS BEGINNING ON MAY 20

An employer violates Section 8(a)(5) of the Act when it makes unilateral changes to a mandatory subject of bargaining without providing the employees' union with notice and an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736 (1962). The Board has consistently held that an employer's decision to lay off bargaining unit employees for economic reasons is a change to terms and conditions of employment, and is a mandatory subject of bargaining that triggers the duty to provide notice and an opportunity to bargain. *Pan American Grain Co.*, 351 NLRB 1412, 1413-1414 (2007), *enfd.* 558 F.3d 22 (1st Cir. 2009); *McClain E-Z Pack, Inc.*, 342 NLRB 337, 342-343 (2004); *Toma Metals, Inc.*, 342 NLRB 787 (2004); *Tri-Tech Services*, 340 NLRB 894, 894–895 (2003). "Layoffs are not a management prerogative. They are a mandatory subject of collective bargaining. Until the modalities of layoff are established in the agreement, a company that wants to lay off employees must bargain over the matter with the Union." *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987), *enfd.* in relevant part *Advertisers Mfg. Co.*, 280 NLRB 1185 (1986).

As alleged in the Complaint, the Respondent in this case violated Section 8(a)(5) by failing to notify, and bargain with, the Union before deciding to lay off bargaining unit employees for 2 weeks starting on May 20, 2019.<sup>24</sup> The record is clear that the Respondent did not give the Union notice prior to making the decision to lay off these employees. The May 14 email and the attached memorandum were sent only after the final decision was made and to inform the Union of a fait accompli over which the Respondent did not express a willingness to bargain. The memorandum states that "begin[ning] May 20 . . . nineteen employees *will* be laid off." (Emphasis added.) The Respondent does not temper this announcement with a statement that this is a *proposed* action or with any language suggesting the slightest willingness to bargain. Zilbauer, an agent of, and witness for, the Respondent, confirmed that the May 14 email presented the

<sup>24</sup> Although the Respondent announced this layoff, the first in 10 years, just 8 days after the Union was certified, there is no allegation in

this case that the layoff was retaliatory in violation of Section 8(a)(3) of the Act.

Union with a fait accompli. He testified that management had already made the decision to carry out the layoff at the time it sent the May 14 email. Indeed, no witness for the Respondent claimed that management had been willing to bargain with the Union before proceeding with the layoff on May 20. An employer does not meet its Section 8(a)(5) duty to bargain when it simply announces a final decision to the union and the circumstances make clear that bargaining would be fruitless. *Brannan Sand & Gravel Co.*, 314 NLRB 282, 282 (1994).

Even assuming that, contrary to the evidence, I had concluded that the Respondent was not simply announcing a fait accompli in its May 14 email, I find that the notice did not meet the Respondent's obligations under Section 8(a)(5) both because the notice was not timely and because it did not provide the specifics of the layoff. As the Board has stated, "[t]he key here is that the proposal should be presented to the union in a timely manner." *Harley-Davidson Motor Co.*, 366 NLRB No. 121, slip op. at 3 fn. 8 (2018). "To be timely, the notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain." *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982), *enfd.* 722 F.2d 1120 (3d Cir. 1983). At a minimum this means that the employer must "inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals." *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001), quoting *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 505 (5th Cir. 1964). Here the Respondent gave the Union no warning that a layoff was in the works until after the normal close of business just 6 days before implementation. The Board has found that comparable, or even somewhat greater, advance notice is not timely. See *Comau, Inc.*, 364 NLRB No. 48, slip op. at 6, 24 (2016) (violation where notice was given 6 days before implementation); *Pontiac Osteopathic Hospital*, 336 NLRB at 1022–1024 (violation where notice was given 20 days before implementation); *Defiance Hospital*, 330 NLRB 492, 493 (2000) (violation where employer's letter gave union 7 days to respond to the notice of a change). On its face this timing did not provide a "reasonable opportunity for counterarguments or proposals," but under the particular circumstances here the timing was even more deficient. Specifically, the Respondent knew it was dealing with a Union that had just been certified and did not have the type of experience with the facility's past practices and seasonal workload that would permit it to instantly propose alternatives to the layoff that the Respondent had decided to implement.<sup>25</sup>

Also consistent with my finding that the Respondent failed to

meet its bargaining obligation is the fact that its pre-layoff notice did not advise the Union which employees would be laid off or how those employees had been selected. Given the Respondent's failure to provide the Union with such details, the Respondent's communication cannot be fairly construed as giving the Union a "reasonable opportunity for counterarguments or proposals." Lacking such details, the Union did not have a meaningful opportunity to propose, for example, that the employer first allow employees to volunteer for the layoff (as had been done in the past) instead of choosing which employees to layoff without regard to their willingness, or ability, to absorb it. Cf. *The Washington Post Co.*, 237 NLRB 1493, 1498 (1978) (notice inadequate where insufficient detail is provided). Such matters are ones regarding which the Union could have negotiated even if market conditions made a layoff inevitable.

Three days after the Respondent's email on the evening of March 14, the Union sent the Respondent a letter demanding that the Respondent cease and desist from laying off employees until it engaged in good-faith bargaining. The Respondent received that letter on the third day of the 14-day layoff. After receiving the letter, the Respondent continued with the layoff as planned. It did not suspend the layoff until it complied with the obligation to bargain, as the Union demanded. Indeed, none of the Respondent's witnesses claimed that they would have been willing to bargain over the layoff if they had received the Union's cease and desist letter prior to the start of the layoff. The testimony of the Respondent's witness Zilbauer was to the contrary—the Respondent had already decided to proceed with the layoff at the time it notified the Union.<sup>26</sup>

I find that the Respondent violated Section 8(a)(5) and (1) by failing to give the Union reasonable notice and an opportunity to bargain regarding the 2-week layoff that began on May 20, 2019.

### III. SECTION 8(A)(5) AND (1): RESPONDENT SUBCONTRACTS JANITOR'S WORK

The Complaint alleges that the Respondent has been violating Section 8(a)(5) and (1) since May 2019 by unilaterally subcontracting bargaining unit janitorial work. The Supreme Court held, in *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 215 (1964), that an employer's "replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment – is a statutory subject of bargaining." See also, *O.G.S. Technologies, Inc.*, 356 NLRB 642, 644 (2011) (same) and *Torrington Enterprises*, 307 NLRB 809, 810–811 (1992) (subcontracting of unit work to an outside contractor is a mandatory subject of bargaining about

<sup>25</sup> For the same reasons, I reject the Respondent's argument that by not responding more quickly to LaPorte's May 14 letter the Union did not act with due diligence to bargain and, therefore, unequivocally waived its statutory right to bargain. Even in the case relied upon by the Respondent on this point, *McCraw-Hill Broadcasting Co.*, the Board specifically stated that an employer *cannot* succeed in showing that a union failed to act with due diligence and waived bargaining where "the employer's notice provides too little time for negotiation before implementation." 355 NLRB 1283, 1284 (2010). Moreover, any shortcomings in a union's response to a unilateral change do not constitute a waiver of bargaining where, as here, the employer presented the change as a fait accompli. *North Memorial Health Care*, 364 NLRB No. 61, slip op. at 24 (2016), *enfd.* in relevant part 860 F.3d 639 (8th Cir. 2017); *Eby-*

*Brown Co.*, 328 NLRB 496, 570–572 (1999); *Dorsey Trailers, Inc.*, 327 NLRB 835, 858 (1999), *enfd.* in part 233 F.3d 831 (4th Cir. 2000); *Jaydon, Inc.*, 273 NLRB 1594, 1601 (1985); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017–1018 (1982), *enfd.* 722 F.2d 1120 (3d Cir. 1983); see also *Naperville Jeep/Dodge*, 357 NLRB 2252, 2272 (2012) (Waiver will not be found where the employer simply announces and implements changes as if it had no obligation to bargain over the effects of the changes.), *enfd.* 796 F.3d 31 (D.C. Cir. 2015), *cert. denied* 136 S.Ct. 1457 (2016).

<sup>26</sup> The Respondent makes no argument, and the evidence does not suggest, that exigent economic circumstances justified implementing the layoff without, or with only expedited, notice and bargaining. Cf. *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995).



which an employer is required to bargain in good faith unless the subcontracting “involve[s] a significant change in scope and direction of the enterprise”); see also *Bob’s Tire Co.*, 368 NLRB No. 33, slip op. at 1 (2019) (Employer violated the Act by failing to notify and bargain with the Union before subcontracting bargaining unit work.). The record in this case demonstrates that, for well over 2 decades, the janitorial work in the mill portion of the Niagara facility had been performed on a full-time basis by employees of the Respondent who fall within the bargaining unit. After the employees selected the Union as their bargaining representative, the Respondent subcontracted this bargaining unit janitorial work to an outside contractor and did so without providing the Union with notice or an opportunity to bargain. I find that the Respondent clearly failed to meet its bargaining obligation with respect to this mandatory subject of bargaining, and by doing so violated Section 8(a)(5) and (1) of the Act.

The Respondent attempts to escape a finding of violation by raising a number of defenses, none of which have merit. First, the Respondent argues that its actions were consistent with past practice because it has not always filled vacant positions in the past. This argument wholly misses the point, since the Complaint allegation is not that the Respondent failed to fill a position, but rather that it transferred work from the bargaining unit to an outside contractor. The Respondent’s argument might have some bearing on this case if the allegation was that, upon Jackson’s departure, management continued to use bargaining unit employees to perform the janitorial work, but failed to fill the position of full-time janitor. However, that is neither what happened, nor what the complaint alleges. The Respondent forwards a second “past practice” defense, arguing that it did not have to bargain because in the past when the bargaining unit janitor was on vacation, or otherwise unavailable to perform his janitorial duties in the mill, the Respondent would in most instances have a contractor, rather than its own employees, fill in for the employee-janitor. The Respondent cites no precedent for its assertion that the occasional use of a contractor to fill-in for a bargaining unit employee means that it does not have to bargain over the wholesale subcontracting of a type of work formerly done by the bargaining unit. The lack of such citation by the Respondent is not surprising since the applicable precedent is to the contrary. The Board distinguishes between piecemeal and wholesale subcontracting, see *San Luis Trucking*, 352 NLRB 211, 231 (2008),<sup>27</sup> and holds that an employer must bargain when it substantially increases or expands the use of contractors to perform bargaining unit work even if it had subcontracted to some degree in the past. *O.G.S. Technologies*, 356 NLRB at 645–646; *Equitable Gas Co.*, 245 NLRB 260, 264–265 (1979), enf. denied 637 F.2d 980 (1981). The Respondent’s subcontracting of all the bargaining unit janitorial work was a substantial expansion of its use of contractors, not as the Respondent’s counsel would have me believe, “wholly consistent with,” Brief of Respondent at Page 67, its past practice of using outside contractors to perform a small portion of that work.

The Respondent also asserts that it had no obligation to

bargain because, although *Fibreboard Paper* requires employers to bargain over the subcontracting of bargaining unit work, that duty does not extend to changes that “alter the Company’s basic operation.” (R. Br. at pp. 66–67.) This argument is frivolous. After subcontracting the work at-issue, the Respondent’s continued in precisely the same business—i.e., paper manufacturing—at the same location. There was no significant commitment, or reallocation of capital. The only change was in the identity of some of the individuals who were performing work relevant to that operation – with contractors substituting for the bargaining unit janitor. The Respondent’s claims that it was going “out of the business of janitorial services” is without merit. Janitorial services never were the Niagara facility’s business. It did not offer the bargaining unit’s janitorial services to customers or otherwise maintain it as a business. The janitorial work was simply part of operating a paper production facility – which is what it continued to do after subcontracting the janitorial work. As the Board made clear in *Torrington Industries*, the subcontracting of bargaining unit work is a mandatory subject of bargaining where, as here, the subcontracting did not change the “scope and direction of the enterprise,” but merely changed “the identify of the employees doing the work.” 307 NLRB at 811.

Finally, the Respondent contends that it was the Union that failed to bargain in good faith since its officers were insisting that the Respondent restore the status quo ante by filling the janitorial position with a bargaining unit employee before the Union would negotiate over the Respondent decision to subcontract that work. I reject this defense, for which the Respondent cites no legal support. The Respondent was required to restore the status quo with respect to the bargaining unit’s janitorial work in order to provide the Union with a true opportunity to bargain over the subcontracting. Cf. *O.G.S. Technologies, Inc.*, 356 NLRB at 647 (“When bargaining unit work has unilaterally and unlawfully been removed . . . by subcontracting,” “the judge properly ordered the restoration of the status quo ante, in order to provide the Union with a true opportunity to bargain over the subcontracting.”), and *Brooks Inc.*, 251 NLRB 757, 764 (1980) (“no good-faith impasse could exist since the breakdown in the negotiations was at least in part attributable to Respondent’s unlawful conduct in failing to restore the *status quo ante*”), enf. 682 F.2d 874 (10th Cir. 1982). Negotiations must proceed from the status quo ante, not from circumstances that the Respondent unlawfully changed and which increase its bargaining power by permitting it, during bargaining, to enjoy the very change that it is statutorily required to bargain over before making. Not to require the Respondent to restore the status quo ante would effectively reward it for violating the Act by vastly improving its bargaining position regarding the change.

The Respondent has violated Section 8(a)(5) and (1) since May 2019 by subcontracting bargaining unit janitorial work without bargaining in good faith with the Union.

<sup>27</sup> This decision was reaffirmed by the Board at 356 NLRB 168 (2010), enf. 479 Fed. Appx. 743 (9th Cir. 2012), after the Supreme Court issued its decision in *New Process Steel*, 560 U.S. 674 (2010).

IV. SECTION 8(A)(5) AND 8(A)(3): CHANGES TO JUNE/JULY 2019  
PROFIT-SHARING PLAN PAYMENTS

The Respondent's employees have received profit-sharing plan payments twice a year for over 20 years. In June/July 2019 the payment that employees at the Niagara facility received were substantially reduced and the Respondent told employees that the union activity at the facility was the reason for the change to their payments. The General Counsel alleges that the Respondent's action was unlawful both because the Respondent did not bargain over the change as required by Section 8(a)(5) and because the change was discriminatory in violation of Section 8(a)(3). For the reasons discussed below I find that the General Counsel has established both violations.

As previously set forth, an employer violates Section 8(a)(5) of the Act when it makes unilateral changes to a mandatory subject of bargaining without providing the employees' union with notice and an opportunity to bargain. *NLRB v. Katz*, supra. In this case the Respondent substantially reduced the June/July 2019 profit-sharing plan payments it made to the unit employees and did so without giving the Union any notice or any opportunity to bargain. In fact, the Respondent expressly asserts that it had no duty to do so. The Respondent makes two arguments to support its claim that it had no obligation to bargain over the change. First it argues that it did not have to bargain over changes to the profit-sharing plan payments because the payments were not a term or condition of employment, but rather a mere "gift." Second, it argues that it did not have to bargain because the payments were made by its corporate parent in Canada, with no involvement by the Respondent itself.

The Respondent's contention that the payment was a gift, rather than a term of employment, is untenable under established Board law. The Board has repeatedly affirmed that profit-sharing, as a matter of law, is a mandatory subject of bargaining. *J.P. Stevens & Co., Inc.*, 239 NLRB 738 fn.3 (1978); *Western Foundries, Inc.*, 233 NLRB 1033, 1037–1038 (1977); *Sunshine Food Markets*, 174 NLRB 497, 504 (1969). These cases are dispositive of the issue in my view, but even if profit-sharing could in rare circumstances be seen as failing to rise to the level of a term and condition of employment, these are not those circumstances. Employees at the Niagara facility had, without interruption, received these payments twice a year for over 20 years. The payments were not mere "pats on the back" of limited economic value – such as a holiday ham or gift card—but rather constituted a significant portion of employees' overall compensation. In

2018, the total of the two profit-sharing payments that each of the Respondent's hourly employees received was, on average, about 21 percent as much as their total other wages for the entire year. Moreover, the amount of the payments was determined by work-related factors that included the facility's profits and the particular employee's other earnings for the relevant time period. The other earnings figure itself incorporated additional work-related factors such as the employee's wage rate, seniority, and hours worked. Even if the Board had not already decided that recurring profit-sharing payments are a mandatory subject of bargaining, it is inconceivable that the payments at-issue here—which are very substantial and dependent on work-related factors could be viewed as something less than terms and conditions of employment. See *Gas Machinery Co.*, 221 NLRB 862, 862–863 (1975) (Christmas bonuses were terms and conditions of employment not gifts where the bonuses were "tied to the remuneration which employees received for their work.").<sup>29</sup>

The Respondent's second defense—that it did not have to bargain with the Union over changes to the profit-sharing plan payments because it was not responsible for making those changes – is not persuasive. For reasons discussed in the statement of facts, I find that the Respondent was responsible for the changes to employees' profit-sharing plan payments.

The Respondent violated Section 8(a)(5) and (1) by changing the manner in which it calculated profit-sharing plan payments and reducing the amount of the June/July 2019 payments to bargaining unit employees without first providing the Union with notice and an opportunity to bargain.

The Complaint also alleges that the Respondent violated Section 8(3) and (1) of the Act because it discriminated based on the employees' protected union activity when it reduced the June/July 2019 profit-sharing plan payments. Where unlawful motivation is in dispute, as here, the General Counsel bears the initial burden under the *Wright Line* analysis of showing that the Respondent's decision to take adverse action against employees was motivated, at least in part, by activities protected by the Act. 251 NLRB 1083, 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). The General Counsel may meet its initial *Wright Line* burden by showing that: (1) the employees engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the union or other protected activity. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1184–1185 (2011); *ADB*

<sup>29</sup> The Respondent reliance on *Bob's Tire Co.* supra, is misplaced. In that case, the Board found that the record evidence was insufficient to show that holiday bonuses (not profit-sharing payments) that the employer distributed to employees rose to the level of terms and conditions of employment. 368 NLRB No. 33, slip op. at 1. An examination of the Board's discussion regarding the holiday bonus paid in *Bob's Tire* reveals that that decision not only does not support the Respondent's argument, but, to the contrary, provides further support for finding that the profit-sharing payments in the instant case are a term or condition of employment. In *Bob's Tire*, the Board stated that the General Counsel's evidence was inadequate because it did not show "the amount paid in any particular year and it is silent as to whether the bonus was tied in any way to employment-related factors." Ibid. The situation in the instant case is exactly the opposite. The record shows the amounts of the profit-

sharing payments paid to bargaining unit employees in 2016, 2017, and 2018. Not only that, but the record evidence shows that the profit-sharing payments that the unit employees received were very substantial. Some employees' total profit share payments for 2018 exceeded \$20,000. Joint Exhibit 1 (see, e.g., employees Patrick Bonacorso, John Newell, and Jeffrey Velzy). Second, unlike in *Bob's Tire*, the record here shows that the payments were tied to "employment-related factors" – specifically to the other remuneration that the Respondent paid the employee during the relevant time period, a factor that itself incorporated additional employment-related factors such as seniority and hours worked. Indeed, in *Bob's Tire*, the Board stated that in a case where, as here, employment-related factors determined the payment amount, the payment "was clearly a term and condition of employment." 368 NLRB No. 33, slip op. at 2.

*Utility Contractors*, 353 NLRB 166, 166-167 (2008), enf. denied on other grounds, 383 Fed.Appx. 594 (8th Cir. 2010); *Intermet Stevensville*, 350 NLRB 1270, 1274-1275 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). Animus may be inferred from the record as a whole, including timing. See *Camaco Lorain* supra. If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Camaco Lorain*, supra; *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra.

In this case, the General Counsel easily meets its initial *Wright Line* burden. There is no dispute either that the Respondent's employees engaged in protected activity by voting to be represented by the Union in April 2019 or that the Respondent was aware of that activity. The evidence also establishes that the Respondent bore animosity towards the union activity and that this animosity was connected to the decision to reduce employees' June/July 2019 profit-sharing plan payments. The Respondent's own witness, human resources manager Zilbauer, identified union activity as the reason for the change to employees' profit-sharing plan payments. In addition, Pozzobon, a supervisor and agent who the Respondent entrusted to tell employees how much they would receive, informed employees that their payments had been reduced and changed because of the Union. The timing of the change to employees' profit-sharing payments provides additional evidence of unlawful motivation. See *Gates & Sons*, 361 NLRB 563, 566 (2014), *LB&B Associates, Inc.*, 346 NLRB 1025, 1026 (2006), enf. 232 Fed.Appx. 270 (4th Cir. 2007); *Desert Toyota*, 346 NLRB 118, 120 (2005), pet. for review denied 265 Fed.Appx. 547 (9th Cir. 2008); *Detroit Paneling Systems*, 330 NLRB 1170 (2000), enf. sub nom. *Carolina Holdings, Inc. v. NLRB*, 5 Fed.Appx. 236 (4th Cir. 2001); *Behlehem Temple Learning Center*, 330 NLRB 1177, 1178 (2000); *American Wire Products*, 313 NLRB 989, 994 (1994). The record shows that management announced it was reducing the first profit-sharing payments made after, and only shortly after, the employees voted for union representation. This would suggest a discriminatory motive even if the Respondent's agents had not openly admitted that union activity was the reason for the change.

Since the General Counsel has met its initial burden, the burden shifts to the Respondent to show that it would have reduced the employees' June/July 2019 profit-sharing payments even absent the anti-union motivation. *Camaco Lorain*, supra; *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*,

supra. In this case, the Respondent has failed to articulate, much less provide evidence of, a non-discriminatory explanation for the decision to reduce employees' profit-sharing payments in the wake of employees' selection of the Union as their bargaining representative. The Respondent has not met its responsive *Wright Line* burden.

I find that the Respondent discriminated in violation of Section 8(a)(3) and (1) of the Act by reducing employees' June/July 2019 profit-sharing plan payments because employees engaged in protected union activity.

#### V. SECTION 8(A)(3): RESPONDENT CEASES SHARING MONTHLY PROFIT INFORMATION WITH EMPLOYEES

The record shows that within days of the union election the Respondent ceased its longstanding practice of displaying, and otherwise sharing with employees, the monthly profit figures for the Niagara facility. In the past, employees had used this information to estimate what they should receive in their next profit-sharing plan payment. The General Counsel easily meets its initial *Wright Line* burden with respect to this allegation. As discussed above, the Respondent was aware that employees had engaged in protected union activity by initiating a union campaign and voting to be represented by the Union. The General Counsel has also established that the Respondent bore animus towards the employees' protected activity. Such animus is demonstrated not only by the Respondent's statements to employees explaining that the union situation was the reason why management reduced the profit-sharing payments, but also by the Respondent's April 29 memorandum to employees. The memorandum informed employees both that management was "disappointed" that employees had decided to be represented by the Union, and that, given the adversarial nature of the union campaign, management might "not be comfortable to share" information "such as profits" with employees anymore. Similarly, LaPorte told Cracknell that the Respondent had stopped sharing the information because there was now a "third party involved."

Since the General Counsel has made the initial showing required by *Wright Line*, the burden shifts to the Respondent to show that it would have taken the same action absent the employees' protected conduct. The Respondent attempts to meet that burden by arguing that the "directive to cease posting profits was legitimate in light of the flyer disseminated by the Union." (R. Br. at 60.) This argument fails for multiple reasons. First, if the Respondent is right, and the flyer, was part of the union campaign,<sup>30</sup> then distributing the flyer was itself protected activity and retaliating against employees for such distribution was unlawful.<sup>31</sup> Therefore, the testimony that the Respondent was

<sup>30</sup> As stated earlier, the evidence does not, in fact, establish that the flyer was created, or distributed, by the Union or as part of the union campaign. LaPorte stated that a supervisor provided it to him shortly before the union election, but there was no testimony about when the flyer came into the possession of the supervisor, and the flyer itself is undated and makes no reference to the Union or the union campaign. The only date referenced in the memorandum is 2017, well before the union campaign started in approximately August 2018. There was no testimony that union officials or supporters were seen distributing the flyer.

<sup>31</sup> I recognize that disparaging statements otherwise protected by the Act may forfeit that protection if they are sufficiently reckless or

maliciously untrue, See *Valley Hospital*, 351 NLRB 1250, 1252 (2007), enf. 358 Fed. Appx. 783 (9th Cir. 2009). However, the Board has guaranteed that employees' Section 7 protection is meaningful by setting a high threshold for forfeiture of that protection. Employees engaged in protected activity may use "intemperate, abusive, or insulting language without fear of restraint or penalty." *Mount Desert Island Hospital*, 259 NLRB 589, 589 fn.1 and 593 (1981) (emphasis in Board decision), affd. in relevant part and remanded 695 F.2d 634 (1st Cir. 1982). Even if "statements are false, misleading or inaccurate" that "is insufficient to demonstrate that they are maliciously untrue" so as to forfeit protection. *Valley Hospital*, 351 NLRB at 1252. The statements in the flyer do not

motivated by the flyer does not, as Respondent seems to believe, tend to show a lawful motive, but rather constitutes additional proof that the Respondent was unlawfully motivated by employees' protected union activity.

In any event, I find that the Respondent has failed to show that, absent the union campaign and the employees' decision to be represented by the Union, management would have reacted to the flyer at-issue here by ceasing its longstanding practice of sharing profit information with employees. For starters, management's April 29 memorandum admits that it was concerned about the flyer *because* it believed the flyer was part of the union campaign. In addition, as stated earlier, there is no evidence, or even a claim, that any of the information used in the flyer had been shared with employees on a confidential basis or was not publicly available. To the contrary, the flyer cites public sources for the information. The profit figures that the Respondent unilaterally stopped displaying were not revealed or even mentioned in the flyer. Thus, the flyer provides no basis for concluding that employees could not be trusted to respect limits on the disclosure of information the Respondent provided to them on a confidential basis. Moreover, LaPorte admitted that he blamed the Union campaign for the flyer without making any attempt to determine whether the Union played any part in its creation or distribution. The fact that the employer failed to investigate the Union's suspected involvement with the flyer before taking punitive action supports the inference of discriminatory motive and further undermines the Respondent's attempt to defend its action based on the flyer. Cf. *Stahl Specialty Co.*, 364 NLRB No. 56 (2016) (evidence that the employer failed to investigate alleged misconduct supports an inference of discriminatory motive), *Relco Locomotives, Inc.*, 358 NLRB 298, 313 (2012) (same) and *Amptech, Inc.*, 342 NLRB 1131, 1146 (2004), enf'd. 165 Fed. Appx. 435 (6th Cir. 2006).<sup>32</sup>

I find that the Respondent discriminated in violation of Section 8(a)(3) and (1) of the Act when it stopped sharing monthly profit information with employees because of their protected union activity.

begin to approach the level that would cause them to lose protection. The creator and/or distributor of the flyer—whoever that might have been—was not shown to have made any disparaging statements that were false, much less any that were recklessly or maliciously false. The statements about LaPorte are quite mild – expressing skepticism about his academic achievements without claiming that LaPorte lied about them, and attempting to highlight LaPorte's personal spending/lifestyle by referencing the value of two of his residences.

<sup>32</sup> Respondent's counsel argues that the complaint paragraph alleging that "the Respondent stopped displaying company profit-sharing information" failed to put the Respondent on notice that the parties would be litigating a possible violation based on the fact that it stopped displaying profit information that employees used to estimate their profit sharing payments. The Respondent's claim that it did, or could, read the complaint allegation in such a narrow and technical manner is both disingenuous and inconsistent with the federal notice pleading standards applied by the Board. First, it is clear that the Respondent knew perfectly well that the parties were litigating an allegation that the Respondent unlawfully stopped sharing profit information for the Niagara facility with

#### VI. SECTION 8(A)(5): RESPONDENT FAILS TO PROVIDE INFORMATION REQUESTED BY THE UNION REGARDING PROFIT-SHARING PLAN

The General Counsel alleges that the Respondent violated its bargaining obligations under Section 8(a)(5) and (1) by failing to provide information that the Union requested in writing regarding the profit-sharing plan. The Union, after receiving reports from employees that the Respondent was telling them the Union was the reason their profit-sharing plan payments had been reduced and changed, made written requests – on August 16, August 26, and September 3, 2019 – for information regarding the profit-sharing plan calculations, payments, and changes to its operation. The Respondent does not deny that it received these requests, the substance of which is set out earlier in this decision, or that it refused to provide the Union with any of the requested information. The Board has held that union requests for information regarding bargaining unit employees' terms and conditions of employment are "presumptively relevant" and must be provided upon request. *Richfield Hospitality, Inc.*, 368 NLRB No. 44, slip op. at 2 fn. 4 and 26 (2019); *Disneyland Park*, 350 NLRB 1256, 1257 (2007). As found above, the profit-sharing plan was a term and condition of employment for the unit employees and, therefore, the Union's request for information about the plan was presumptively relevant and the Respondent was required to provide the information. See *A-1 Door & Building Solutions*, 356 NLRB 499, 499–500 (2011) (information related to employer profit-sharing plans must be provided upon request) and *Fremont Manufacturing Division*, 259 NLRB 355, 357 (1981) (same). "Like a flat refusal to bargain, '[t]he refusal of an employer to provide a bargaining agent with information relevant to the Union's task of representing its constituency is a per se violation of [Section 8(a)(5) of] the Act' without regard to the employer's subjective good or bad faith." *Piggly Wiggly Midwest, LLC*, 357 NLRB 2344, 2355 (2012), quoting *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975).

The Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the information that the Union has requested since August 16, 2019, regarding the profit-sharing plan.

employees. The Respondent's counsel addressed the issue in his opening statement, Tr. 271, and the Respondent made extensive efforts at the hearing to defend the conduct. This defense included examining LaPorte regarding the decision to stop displaying the monthly profit information for the Niagara facility, the purported justification for that decision, and LaPorte's explanation for his reaction to the flyer. The Respondent entered the flyer as an exhibit. The Respondent also elicited testimony from LaPorte aimed at avoiding responsibility for the refusal to display or otherwise share the profit information with employees. The Board, consistent with federal notice pleading standards, only requires that the complaint provide "due notice" of the charges such that the employer is provided with a "full opportunity" to "put upon [its] defense." *Artesia Ready Mix Concrete, Inc.*, 339 NLRB 1224, 1226 & fn. 3 (2003) (citing cases). Notice pleading does not require the particularity of pleading of an indictment or information, nor the elements of a cause like a declaration at law or a bill in equity. *Ibid.*; see also *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 349–350 (1938). In this case the Respondent was fully aware that the violation I find was being litigated pursuant to the complaint and counsel had a full opportunity to present its defense.

## CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act in June and/or July 2019 when it told employees that the Respondent's profit-sharing payments to them had been reduced and changed because of the union situation at the facility.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by failing to give the Union reasonable notice and an opportunity to bargain regarding: the 2-week layoff it implemented on May 20, 2019; the subcontracting of bargaining unit janitorial work since May 2019; and changes to the manner in which it calculated, and the amounts of, the June/July 2019 profit-sharing plan payments to unit employees.

5. The Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with the information, requested since August 16, 2019, about the profit-sharing plan.

6. The Respondent discriminated on the basis of employees' protected union activity in violation of Section 8(a)(3) and (1) of the Act when it: reduced employees' June/July 2019 profit-sharing plan payments; and ceased to display, or otherwise share with employees, monthly profit information for the Niagara facility.

6. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, the Respondent must be ordered to cease and desist from changing the terms and conditions of employees in the bargaining unit without first providing the Union with notice and an opportunity to bargain. Upon the Union's request, the Respondent should be required to retroactively rescind the unilateral changes, including the employee layoffs, the subcontracting of the bargaining unit janitorial work, and the reductions to profit-sharing plan payments, and make whole its employees for any losses of earnings and other benefits suffered as a result of the unlawful changes. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters and shall also compensate the employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB 518 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>33</sup>

## ORDER

The Respondent, Cascades Containerboard Packaging—Niagara, a Division of Cascades Holding US Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercing employees in the exercise of their rights under the Act by telling them that their profit-sharing plan payments have been reduced or changed because employees engaged in protected union activity.

(b) Refusing to display, and otherwise share with employees, monthly profit information for the Niagara facility.

(c) Changing the manner in which it calculates profit-sharing plan payments or reducing the amount of those payments to bargaining unit employees because employees engaged in protected union activity.

(d) Changing the manner in which it calculates profit-sharing plan payments or reducing the amount of those payments to bargaining unit employees without bargaining in good faith with the Union.

(e) Laying off employees without bargaining in good faith with the Union over the layoff and the effects of the layoff.

(f) Subcontracting bargaining unit work without bargaining in good faith with the Union.

(g) Refusing to provide the Union with information it requests that is necessary for and relevant to performance of its duties as exclusive collective-bargaining representative.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make the bargaining unit employees whole, with interest, for the loss of earnings and other benefits, resulting from the 2 weeks of layoffs that began on May 20, 2019.

(b) Make the bargaining unit employees whole, with interest, for the loss of earnings and other benefits suffered as a result of the decision to, after April 26, 2019, subcontract bargaining unit janitorial work.

(c) Make the bargaining unit employees whole, with interest, for the loss of earnings and other benefits suffered as a result of the unlawful changes to employee profit-sharing plan calculations and payments.

(d) Display and share monthly profit information for the Niagara Falls facility in the manner this information was displayed and shared prior to the April 2019 union election.

(e) Rescind the unlawful changes made to the manner in which it calculates profit-sharing plan payments to unit employees.

(f) Provide the Union with the information sought in the Union's requests of August 16, August 26, and September 3, 2019.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records,

<sup>33</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended

Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Niagara Falls, New York, copies of the attached notice marked "Appendix."<sup>34</sup> Copies of the notice, on forms provided by the Regional Director for Region Three, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 26, 2019.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 17, 2020

#### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coerce you by stating that your profit-sharing plan payments are being reduced or changed because you voted to unionize or otherwise engaged in union activity.

WE WILL NOT refuse to display, and otherwise share with you, monthly profit information for the Niagara Falls facility.

WE WILL NOT change the manner in which we calculate profit-sharing plan payments or reduce the amount of those payments to you because you vote to unionize or otherwise engage in protected union activity.

WE WILL NOT change the manner in which we calculate profit-

sharing plan payments and/or reduce the amount of those payments to you without first bargaining in good faith with the International Association of Machinists and Aerospace Workers, District Lodge 65, AFL-CIO (the Union).

WE WILL NOT lay you off without first bargaining in good faith with the Union over the layoff decision and the effects of that decision.

WE WILL NOT subcontract bargaining unit work without first bargaining in good faith with the Union.

WE WILL NOT refuse to provide the Union with information it requests that is necessary for and relevant to performance of its duties as your exclusive collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL display, and otherwise share with you, monthly profit information for the Niagara Falls facility in the same manner as we did prior to the April 2019 union election.

WE WILL rescind the unlawful changes to the manner in which we calculate profit-sharing plan payments to you.

WE WILL provide the Union with the information regarding the profit-sharing plan that the Union sought in its requests of August 16, August 26, and September 3, 2019.

WE WILL make you whole, with interest, for the loss of earnings and other benefits, resulting from the 2 weeks of layoffs that we implemented beginning on May 20, 2019.

WE WILL make you whole, with interest, for the loss of earnings and other benefits suffered as a result of our decision to subcontract bargaining unit janitorial work.

WE WILL make you whole, with interest, for the loss of earnings and other benefits suffered as a result of our decision to unlawfully change your profit-sharing plan payments.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate you for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

CASCADES CONTAINERBOARD PACKAGING—NIAGARA,  
A DIVISION OF CASCADES HOLDING US INC.

The Administrative Law Judge's decision can be found at [www.nlrb.gov/case/03-CA-242367](http://www.nlrb.gov/case/03-CA-242367) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

<sup>34</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the

United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

